(8)

No. 97-873

In The

Supreme Court of the United States

October Term, 1997

UNITED STATES OF AMERICA,

Petitioner,

vs.

ALOYZAS BALSYS,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT

IVARS BERZINS
Counsel of Record
IVARS BERZINS, P.C.
Attorney for Respondent
484 West Main Street
Babylon, New York 11702-3000
(516) 661-3540

30 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes:

Other Authorities:

In the Supreme Court of the United States

October Term, 1997

No. 97-873

UNITED STATES OF AMERICA, PETITIONER,

v.

ALOYZAS BALSYS, RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

SUMMARY OF THE ARGUMENT

In *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964), the Court overruled those precedents that were inconsistent with the historically recognized policies and purposes of the privilege against self-incrimination. Withholding the privilege from those who fear foreign prosecution also defeats the policies and purposes of the privilege. The paramount purpose of the privilege against self-incrimination is to safeguard individual liberty. It is not a mere limitation on the rights of the government. Confronting the individual with the cruel trilemma of self-accusation, perjury or contempt, is an impermissible government intrusion upon the privacy and dignity of the individual. The individual's integrity is

compromised when the compulsion takes place, not when the feared criminal prosecution ensues. Thus, the venue of the feared criminal prosecution ought not determine if the privilege can be invoked.

The Court of Appeals recognized the *Murphy* Court's perception of the policies and purposes of the privilege and rejected the narrow view advocated by the government that resurrects the overruled authorities and exalts the needs and convenience of the government. If the privilege were to be limited to fears of domestic prosecution only, a large part its policies and purposes would be defeated. Also defeated would be the expanding recognition of human rights and civil liberties that goes hand in hand with "cooperative internationalism" in law enforcement so actively being promoted by the United States.

The government's exaggerated claims notwithstanding, impairment of law enforcement efficiency resulting from recognition of the privilege will be negligible. Moreover, the privilege cannot yield regardless how grave the impairment of the government's law enforcement needs may be. Balancing of the competing interests is impermissible. *New Jersey v. Portash*, 440 U.S. 450, 459 (1979).

ARGUMENT

POINT I

THE PRIVILEGE IS A FUNDAMENTAL RIGHT OF THE INDIVIDUAL RATHER THAN A MERE LIMITATION ON THE RIGHTS OF THE GOVERNMENT

The privilege has been described as "one of the most valuable prerogative of the citizen." *Brown v. Walker*, 161 U.S. 591, 610 (1896). "The right of an accused person to refuse to testify, which had been in England merely a rule of evidence, was so important to our forefathers that they raised it to the dignity of a

Constitutional Amendment." *Slochower v. Board of Education*, 350 U.S. 551, 557 (1956). The notion that the privilege is only available for certain types of citizens or residents has been emphatically rejected. "We find no room in the privilege against self-incrimination for classification of people so as to deny it to some and extend it to others." *Spevack v. Klein*, 385 U.S. 511, 516 (1967). Whether they be the school teacher in *Slochowen v. Board of Education*, 350 U.S. 551 (1956), the policemen in *Garrity v. New Jersey*, 388 U.S. 493 (1967), or the lawyer in *Spevack v. Klein*, *supra*, they all "enjoy first-class citizenship." Id. Similarly, there ought not be classification of people according to what criminal prosecution they fear, domestic or foreign.

The Court has traditionally given the privilege a broad construction. It "must not be interpreted in a hostile or niggardly spirit." *Ullmann v. United States*, 350 U.S. 422, 426 (1956); *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892); *Boyd v. United States*, 116 U.S. 616, 635 (1886). The historical development of the privilege is reviewed in *United States v. Gecas*, 120 F.3d 1419, 1435-1457 (11th Cir. 1997) (en banc), petition for cert. pending, No. 97-884, and also *Moses v. Allard*, 131 B.R.W. 328, 341-342 (E.D. Mich. 1991).

An important purpose, if not the main purpose, of the privilege is to protect the individual's privacy and his dignity and integrity as a person. It is a right with which individuals are vested, not a burden imposed on one sovereign or another. This Court described it in *Malloy v. Hogan*, 378 U.S. 1, 11 (1964): "What is accorded is a privilege of refusing to incriminate one's self, and the feared prosecution may be by either federal or state authorities." Thus, the immunity statute allowing the government to compel incriminating testimony does so by ensuring that the witness's privilege is not abridged. "[P]rotection coextensive with the privilege is the degree of protection that the Constitution requires." *Kastigar v. United States*, 406 U.S. 411, 459 (1972). An interrelated, but not dominant, interest is the preservation of an accusatorial system of criminal justice. In *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964), those interrelated interests were characterized thusly:

It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load, ...'; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life.' , our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'

The individual liberty component clearly predominates in this expression of the policies and purposes of the privilege against self-incrimination. The Court of Appeals recognized the predominance of this concern for the individual by placing it at the top of its list of values promoted by the privilege. Pet. App. 16a.

The government fails to recognize the individual liberty component and advocates instead a single purpose, "to prevent the abuse of power." G. Br. 9, 26. But in *Murphy*, the Court emphasized not the "interests of the state or federal government in law enforcement and use of testimony, but the multiple policies behind an expansive interpretation of this ancient privilege" and the "fundamental values and noble aspirations" it reflects. 378 U.S. at 55, 56 n.5. The Court stated:

> It will not do ... to assign one isolated policy to the [fifth amendment] privilege, and then to argue that since "the" policy may not be furthered measurably across state-federal lines, it follows that the privilege should not be so applied.

However, the view of the Fourth, Tenth and Eleventh Circuits is just such a narrow approach.[1] The broad interpretation of the privilege in *Murphy* has not been disaffirmed by other major Fifth Amendment cases, *see e.g., Kastigar v. United States*, 406 U.S. 441 (1972) and *Doe v. United States*, 487 U.S. 201 (1988), as the government seems to suggest. G. Br. 27. Neither is *Murphy* impaired by footnote 42 at 406 U.S. 456 of the *Kastigar* opinion. The *Murphy* decision can also be supported on *United States v. Saline Bank*, 26 U.S. 100 (1828), and *Ballmann v. Fagin*, 200 U.S. 186 (1906), two cases that were decided before *Malloy* applied the Fifth Amendment to the states.

The government attempts to further denigrate and restrict the privilege by speculating, without citing any authority, that the Framers never intended it to have a broader application than the Sixth Amendment's reference to "all criminal prosecutions" in domestic courts. G. Br. 11-16. The short answer is that if that were so, the Framers should have included the privilege in the Sixth Amendment. Moreover, *Counselman v. Hitchcock*, 142 U.S. 547, 563, has withstood the test of time on that point.

The government attempts to obliterate the individual liberties component and ignore the "cruel trilemma" that occurs at the time of compulsion by the notion that the violation occurs only at trial, and since the trial will not take place in the United States, there is no violation. G. Br. 22. Thus, the government seeks to relegate the privilege to the status of a "prophylactic rule," as the plurality opinion did in *Gecas*, 120 F.3d at 1429. The government's reliance on *Kastigar* and *United States v. Verdugo-Urquides*, 494 U.S. 259, 264 (1990), for the proposition that the

---

[1] *United States v. (Under Seal)*, 807 F.2d 374 (4th Cir. 1986), *United States v. Under Seal (Araneta)*, 794 F.2d 920 (4th Cir. 1986), *cert. den.* 479 U.S. 924, 107 S. Ct. 331, 93 L. Ed. 2d 303 (1986). See also *In Re Grand Jury Proceedings, No. 700*, 817 F.2d 1108 (4th Cir. 1987), declining to reconsider the issue. *In Re Grand Jury Proceedings 82-2*, 705 F.2d 1224 (10th Cir. 1982), *cert. den.* 103 S. Ct. 2087; *In Re Parker*, 411 F.2d 1067 (10th Cir. 1969), vacated as moot sub nom, *Parker v. United States*, 397 U.S. 96, 90 S. Ct. 819, 25 L. Ed. 2d 81 (1970). *United States v. Gecas*, 120 F.3d 1419 (1997) (en banc), petition for cert. pending, No. 97-884.

violation occurs only at trial is misplaced. *Verdugo* has to be read in its proper context, the Fourth Amendment and not the Fifth. The Court cited *Malloy v. Hogan* that the privilege is a fundamental trial right of criminal defendants and cited *Kastigar* that the violation occurs only at trial. *Verdugo*, 494 U.S. 259, 264. Those points were made only for purposes of explaining and illuminating the non-trial related policies and purposes of the Fourth Amendment and ought not be read as intending to limit the scope of the Fifth Amendment by holding that only use and never compulsion can constitute a violation. Such a holding was not necessary for deciding *Kastigar* and *Verdugo*. Moreover, it is imprecise and unrealistic to say that the violation occurs only at trial. The violation is a process that begins at the time of compulsion and culminates when the fruits of the compulsion are offered and received in evidence at the time of trial. Thus, neither the Fourth Amendment cases nor the immunity cases are useful guides for deciding when a violation occurs. It is plain that the *Murphy* court in discussing the policies and purposes of the privilege had not only use, but also compulsion, in mind as a violation. Compulsion without immunity, not use, invokes the "cruel trilemma."

The notion that the privilege applies only when the compelling sovereign and the using sovereign are both bound by the Fifth Amendment finds support in the "same sovereign" line of cases overruled in *Murphy*. The Fourth Circuit referred to those cases in reaching that conclusion. *Araneta*, 794 F.2d at 926. The government also refers to those cases when claiming that "a witness could not refuse to testify based on a fear of prosecution by a jurisdiction that was not bound by the Fifth Amendment." G. Br. 20.

That *United States v. Murdock*, 284 U.S. 141 (1931), was explicitly overruled in *Murphy* is clear, 378 U.S. at 57, where the Court said:

> Our review of the pertinent cases in this Court and of their English antecedents reveals that Murdock did not adequately consider the relevant authorities and has been significantly weakened by subsequent decision of this Court, and, further,

> that the legal premises underlying *Feldman [v. United States*, 322 U.S. 487 (1944)] and *Knapp* have since been rejected.

That *Knapp v. Schweitzer*, 357 U.S. 371 (1958), was overruled by the Court in *Murphy* is also clear. In *Murphy*, the Court reviewed *Knapp v. Schweitzer* and the "rule then in existence," on which *Knapp* was based, that "[t]he sole . . . purpose of the Fifth Amendment privilege against self-incrimination is the security of the individual against the exertion of the power of the Federal Government to compel incriminating testimony with a view to enabling that same Government to convict a man out of his own mouth." 378 U.S. at 77. The Court then announced: "The Court has today rejected that rule, and with it, all the earlier cases resting on that rule." 378 U.S. at 77. *Knapp v. Schweitzer* is clearly among those rejected. The Court further stated at 77, "We reject--as unsupported by history or policy--the deviation from [the correct] construction only recently adopted by this Court in *United States v. Murdock, supra,* and *Feldman v. United States, supra*."

The Court concluded that "the authorities relied on by the Court in *Hale v. Henkel*, 201 U.S. 43 (1906), provided no support for the conclusion that under the Fifth Amendment 'the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty.'" 378 U.S. at 69. Thus, the Court rejected the language which has formed the authority for the *Murdock* and *Knapp* decisions which are the basis of the Fourth Circuit's premise that "the Fifth Amendment privilege applies only where the sovereign compelling the testimony and sovereign using the testimony are both restrained by the Fifth Amendment from compelling self-incrimination," (*Araneta*, 794 F.2d 920, 926).

The earlier overruled decisions which refused to protect witnesses from testifying based upon the fear that their testimony would be used against them in another sovereign's prosecution were decided on obsolete grounds. *Jack v. Kansas*, 199 U.S. 372 (1905), which was discussed in the *Murphy* opinions, is illustrative. There the Court held that a witness immunized under a state statute could not base his refusal to testify on a fear of federal prosecution for the reason that it presented "a danger so

unsubstantial and remote that it was not necessary (as it was impossible) for the statute to provide against it.. . . We do not believe in such case there is any real danger of federal prosecution." *Id.* at 382. Such rulings are not based on dispositive significance merely to the identity of the prosecuting authority. They were based on the more pragmatic premise that the risk of prosecution by federal authorities was in that era remote. Similarly, in earlier times the risk of a prosecution of a witness in the United States by a sovereign overseas was also remote due to the obstacles of geography and the absence of international judicial procedures. Those conditions no longer prevail.

The argument that the Fifth Amendment does not protect against all adverse uses of compelled testimony ignores the fact that foreign criminal prosecution is not just another adverse use, it is the criminal case that the language of the Fifth Amendment envisions. G. Br. 27-29. This is especially so where, unlike *Zicarelli v. New Jersey Comm'n of Investigation*, 406 U.S. 472 (1972), the government is investigating crimes perpetrated in foreign lands and has excellent reasons for stimulating foreign criminal prosecutions of the perpetrators. See *Gecas*, 120 F.3d at 1466 n.51, Gecas Pet. App. 111a, dissenting opinion of Judge Birch.

POINT II

LIMITING THE CLAUSE TO FEARS OF DOMESTIC PROSECUTIONS WOULD DEFEAT A LARGE MEASURE OF ITS POLICIES AND PURPOSES AS WELL AS CONSTITUTE A SIGNIFICANT SETBACK TO THE WORLDWIDE PROGRESS BEING MADE IN THE RECOGNITION OF HUMAN RIGHTS AND CIVIL LIBERTIES

The government is not trying to stop the misuse of an ancient shield. It seeks from this Court a modern weapon for fighting the crime that is rampant in the global village. G. Br. 35, n.12. The government seeks from this Court a decision that "opens the door for the use of our courts to compel the testimony of a United States citizen in the service of a foreign sovereign's

prosecution." Dissenting opinion of Judge Birch in *Gecas*, 120 F.3d at 1466, Gecas Pet. App. 151a. "Nowhere is cooperation more vital," U.S. President William J. Clinton declared in an address to the U.N. General Assembly, "than in fighting the increasingly interconnected groups that traffic in terror, organized crime, drug smuggling, and the spread of weapons of mass destruction."[2] Our government's domestic law enforcement activities abroad seem to be ever-expanding. As noted by Justice Brennan in his dissenting opinion in *United States v. Verdugo - Urguidez*, 494 U.S. 259, 279 (1990), "Particularly in the past decade, our Government has sought, successfully, to hold foreign nationals criminally liable under federal laws for conduct committed entirely beyond the territorial limits of the United States that nevertheless has effects in this country." The Court of Appeals also noted the correlation between "cooperative internationalism" and the interest of the United States in foreign criminal prosecutions. Pet. App. 17a - 21a.

With this expansion of law enforcement activities beyond our borders will come ever-increasing demands that our Article III courts compel American tourists, traders and business people, as well as aliens under our jurisdiction, to testify about their activities and contacts while abroad. If need be, immunity from domestic prosecution will be granted and the testimony and its fruits will be exported to our foreign friends of the moment for such use as is then in vogue. Thus, more and more of our citizens and aliens within our jurisdiction will be subjected to the whipsaw effect feared in *Murphy* and faced with the cruel trilemma of self-accusation, perjury or contempt. *Murphy*, 378 U.S. at 55. Perhaps few tears would be shed if this trilemma could be limited to Nazi war criminals, Bosnian war criminals, Rwandan war criminals, Sadam Hussein's eager helpers and others of that ilk, but such limitation the government does not seek. The government seeks unfettered use of the compelled testimony and its fruits for

---

[2] G. Br. 34. Remarks to the United Nations General Assembly in New York City, 31 Weekly Comp. Pres. Doc. 43 (Oct. 22, 1995); *cf.* David Johnston, *Strength Is Seen in a U.S. Export: Law Enforcement*, N.Y.TIMES, Apr. 17, 1995, at A1 ("international crime is increasingly being defined as a national security issue").

whatever foreign prosecution might in its unlimited discretion be deemed advantageous. G. Br. 23. The incentives as well as the opportunities for abuse are mind boggling.[3]

As expanding concepts of international law recognize the individual as a subject of international law, there has been a corresponding expansion of internationally recognized human rights, including the rights of the accused. While the right to remain silent has not yet achieved universal recognition and uniform application, the accelerating trend is definitely in that direction. *See* Diane Marie Amann, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context* at 62 - 84 (forthcoming in 45 UCLA L. Rev. June 1998).

It would be extremely incongruous if it came to pass that the laws and practices of other nations prohibited compulsion of testimony in their own courts while accepting compelled testimony and its fruits exported by the United States. Under the government's niggardly view, any plea that the using sovereign has laws and practices that parallel our Fifth Amendment would be dismissed as irrelevant because the foreign prosecution is not "any criminal case" and therefore the compulsion that takes place on our soil cannot possibly violate our Constitution because the violation takes place only at trial. Thus, even if the using sovereign is bound by something akin to the Fifth Amendment, the compulsion could proceed. Such a result obliterates the individual liberties rationale of *Murphy* and resurrects the "same sovereign" thinking that *Murphy* obliterated. As reciprocity between the federal and state governments within the United States contributed to the holding in *Murphy*, so should international reciprocity weigh in favor of recognizing the availability of the privilege in this case. *See* Amann, *supra*, at 98-101.

---

[3] It is utterly absurd to declare, as the government does on page 22 of its brief, that "The potential for circumvention of the Self-Incrimination Clause that concerned the Court in *Murphy* does not exist when only the government compelling the testimony, and not the government using it, is bound by the Clause.", and at page 27: "The purpose of preventing abuses of power by the prosecution in the compulsion of incriminating testimony is fully served if the Fifth Amendment privilege is limited to persons at risk of domestic prosecution."

POINT III

THE CLAIMED IMPEDIMENT TO LAW ENFORCEMENT IS EXAGGERATED AND CANNOT BE BALANCED AGAINST THE PRIVILEGE IN ANY EVENT

A. IMPEDIMENT IS NEGLIGIBLE

The government raises concerns about impediment to law enforcement but fails to point to any studies or other hard evidence that shows the effect on law enforcement from the miniscule number of cases where a real and substantial fear of foreign criminal prosecution has been established. All that has ever been presented to any court are suppositions, speculations, dire predictions and similar self-serving opinions from the prosecutors about rogue governments, renegade states, widespread conspiracies and sinister cartels. A real and substantial harm to law enforcement has not been shown. The absence of substance has been supplanted by rhetoric and hypotheticals. The example given in *United States v. Lileikis*, 899 F. Supp. 802, at 807, n.9, overlooks the heavy burden. Pet. App. 45a - 46a. The government intones that this burden "is not a workable one" but fails to point out any instances where the claimed difficulties were insurmountable or of a different nature than in domestic prosecutions. G. Br. 36. Neither here nor in *Gecas* did the District Courts encounter any difficulties. Furthermore, such difficulties as may arise, inure to the benefit of the government since the claimant has the burden of proof. The claimant must prove the foreign law he fears. The claimant must show that his fear of foreign criminal prosecution under that law is real and substantial, and not merely theoretical or contrived. In addition, the claimant must show that he is likely to be delivered to the foreign land for prosecution. It is worthy of note that there have been very few claimants to the privilege and very few of them have ever sustained this burden. Pet. App. 29a - 31a. Even a successful claimant pays a heavy price to the government. He relinquishes his right to take the witness stand in his own defense. In civil proceedings the negative inference drawn from the

exercise of the privilege can doom the claimant. Pet. App. 32a - 33a. This inference may be worth more to the government than the compelled testimony.

Compulsion may be fruitless and even when it triumphs, the compelled testimony may also turn out to be worthless because the witness who expects to face a foreign firing squad will choose a nice comfortable American jail or lie rather than give truthful testimony against himself. Such a witness will harm our systemic concerns by either increasing our jail population or permeating our judicial proceedings with perjury. In this sense, denial rather than recognition of the privilege will impair law enforcement. Pet. App. 47a - 48a.

The government pretends that it does not have the means to enter into treaties or other binding arrangements whereunder immunity could be granted by foreign governments under "cooperative internationalism." The government's support for the views expressed in *United States v. Lileikis*, 899 F. Supp. 802 (D. Mass. 1995), G. Br. 35, ignores cases such as *In re Erato*, 2 F.3d 11 (2d Cir. 1993), where the privilege was supplanted by immunity granted by the foreign government. See also the alternatives to immunity statutes suggested by the Court of Appeals. Pet. App. 33a - 40a.

The instances where a witness has real and appreciable fear of foreign prosecution will more than likely predominantly involve crimes committed on foreign soil. Thus, domestic prosecution will not be unduly hindered because the questions to be asked the witness can be confined to domestic activities. *Zicarelli, supra.* Where that is not possible, it is part of the price we pay for our liberties. Pet. App. 31a.

The government also exaggerates when it imputes to the Framers intent that the privilege "be no broader than the government's power to grant immunity." G. Br. 31. Neither *Lefkowitz v. Turley*, 414 U.S. 70 (1973) nor *Pillsbury Co. v. Conboy*, 459 U.S. 248, 252 (1983), supports such a profound limitation on the outer boundaries of the privilege. In *Counselman v. Hitchcock*, 142 U.S. at 562, the Court said that the protection of

the privilege "is as broad as the mischief against which it seeks to guard." Rather, the immunity cases can be viewed as holding that the courts will not compel testimony unless immunity coextensive with the privilege is granted. *Kastigar*, 406 U.S. at 459. Thus, until immunity from foreign prosecution is secured, there ought not be any compulsion.

If the Framers had been presented with a realistic assessment of the magnitude of the harm to law enforcement rather than the exaggerated version, labeled an "absolute bar," G. Br. 31, it is difficult to imagine that it would have impelled the Framers to redraft the privilege to read "in any domestic criminal case."

B. BALANCING OF LAW ENFORCEMENT INTERESTS AGAINST INDIVIDUAL RIGHTS IS IMPERMISSIBLE

Despite this Court's observation in *Lefkowitz v. Turley*, 414 U.S. 70 (1973) that "claims of overriding interests are not unusual in Fifth Amendment litigation and they have not fared well," the government's exaggerated claims continue to fall on receptive ears. Fear of impeding law enforcement motivated the Fourth Circuit in *United States v. Under Seal (Araneta)*, 794 F.2d 920, 926 (4th Cir. 1986). The Tenth Circuit in *Parker, supra*, resorted to balancing when it denied the privilege, because the laws of some countries may be repugnant to our sense of justice. In *Lileikis*, the District Court adopted a test which can be summarized as "the privilege must yield if there is a need":

> If a governmental interest in enforcing the organic laws of the United States is involved, and the United States has a legitimate need for a witness's testimony in furthering that interest, its privilege must yield if the sole basis for claiming its protections is the fact that a resident of the United States faces the likelihood of a foreign prosecution. It would be an unacceptable affront to the sovereignty of the United States if the operation of its laws could be stymied by the desire of a foreign government to prosecute the same witness. 899 F.Supp. 802, 809.

The District Court in this case also voiced this fear in rather strong terms:

> [T]o allow Balsys to invoke the privilege would unreasonably impinge on the government's ability to monitor and verify immigration and visa applications.
>
> . . . . . .
>
> A contrary decision by this court would allow individuals attempting to immigrate to the United States to misrepresent their personal histories and other relevant information in order to gain access to this country, leaving the government without recourse and seriously eroding domestic law enforcement. 918 F. Supp. 588, at 599. Pet. App. 77a, 78a.

The District Court in this case not only ignored the individual's liberty interests,[4] but also engaged in an impermissible balancing process that the government wants this Court to adopt. This Court has emphatically rejected such balancing of interests. *New Jersey v. Portash*, 440 U.S. 450, 459 (1979).

The balancing argument was also rejected in *In Re Cardassi*, 351 F. Supp. 1080 (D. Conn. 1972) at 1086:

> [A] constitutional privilege does not disappear, nor even lose its normal vitality, simply because its use may hinder law enforcement activities. That is a consequence of nearly all the protections of the Bill of Rights, and a consequence that was originally and ever since deemed justified by the need to protect individual rights.

---

[4] Read literally, the District Court's opinion gives the government a windfall by compelling the resident alien to testify against himself in any criminal prosecution for visa fraud under INA 275(a)(3), 8 U.S.C. 1325(a)(3); perjury under 18 U.S.C. 1621 or making false statements under 18 U.S.C. 1001, which are subject to the five year statute of limitations in 18 U.S.C. 3282.

Thus, the District Court as well as the Fourth and the Tenth Circuit have degraded the privilege by balancing it against efficiency in law enforcement.[5] The privilege that "reflects many of our fundamental values and most noble aspirations" deserves more. *Murphy*, 378 U.S. at 55. See also *Moses v. Allard*, 131 B.R.W. 328, 351-353 (E.D. Mich. 1991), where the Fourth Circuit's decision in *United States v. Under Seal (Araneta)*, 794 F.2d 920 (4th Cir. 1986), *cert. den.*, 479 U.S. 924, 107 S.Ct. 331, 93 L.Ed. 2d 303, is analyzed and criticized.

Equally unpersuasive are the arguments advanced in *Araneta* and adopted in *Lileikis* as well as by the District Court, that our national sovereignty would be compromised if the government could not extract incriminating testimony from someone who fears foreign criminal prosecution. Neither the foreign government nor its laws infringe on our sovereignty. The Framers granted to the person the privilege not to be a witness against himself, so as to safeguard and preserve his dignity and individual liberty. The Framers did not grant to the government the right to force persons to incriminate themselves. The absence of the right to force incrimination without immunity may on occasion make law enforcement tasks more difficult, but that is what the Framers intended. This consequence flows from the Fifth Amendment, not from the laws or actions of any foreign power.

---

[5] The Eleventh Circuit plurality in *Gecas*, 120 F.3d at 1434, Gecas Pet. App. 32a, declined to ground its decision on efficiency in law enforcement, but mentioned it nevertheless.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Dated: March 27, 1998

Ivars Berzins

IVARS BERZINS, P.C.
Attorney for Respondent
484 West Main Street
Babylon, NY 11702-3000
516--661-3540